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Equitable Considerations for Families with Same-Sex Parents: *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002), and the Use of the Doctrine of *In Loco Parentis* by Nebraska Courts

Katie A. Fougeron

University of Nebraska College of Law

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Equitable Considerations for Families with Same-Sex Parents: *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002), and the Use of the Doctrine of *In Loco Parentis* by Nebraska Courts

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I. INTRODUCTION

In recent decades, *family* as a social entity has metamorphosed into various forms, expanding the boundaries of its definition beyond those that existed traditionally. While it is critical for the law to respond to societal changes, the law—especially family law, intertwined as it is with local discretion and jurisdictional custom—often does so in a tentative and asymmetrical fashion among the states. Certainly,

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* Katie A. Fougeron, B.S. 2001, University of Nebraska–Kearney; J.D. expected May 2005, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Executive Editor, 2004). Thank you to Ken, Sherry, and Abbie Fougeron for their encouragement and support. Thanks also to Professor Alan Frank, Stephanie Frost, Jason Sutton, and Patricia Coate for their insight and assistance in the creation and publication of this Note.

state courts must give full faith and credit to judicial rulings of other states.¹ Beyond this constitutional mandate, however, state courts exercise the authority to interpret their own state laws. Furthermore, as courts of equity, state courts have long held authority over the persons and property of the state's children under their "general duty as *parens patriae* to protect persons who have no other rightful protector."² It is within these broad parameters that state courts function to ensure the fair and equitable disposition of cases involving families and children.

The Nebraska Supreme Court's opinion in *Russell v. Bridgens*³ illustrates Nebraska's venture into the relatively uncharted territory of the legal relationships between same-sex parents and their children. *Russell* involved the appeal of a Nebraska lower court's ruling that a coparent adoption completed in Pennsylvania by a same-sex couple was invalid under Pennsylvania law.⁴ *Russell* appealed the district court's ruling that granted summary judgment to Bridgens, *Russell*'s former partner.⁵ The lower court held that because the Pennsylvania court⁶ did not have jurisdiction to grant a Pennsylvania coparent adoption,⁷ the adoption decree was invalid, and therefore, *Russell* could not prevail on a petition to establish custody and support. The

1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

2. *Ins. Co. v. Bangs*, 103 U.S. 435 (1880). The Supreme Court stated:

The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the crown as *parens patriae* is more frequently exercised in this country by the courts of the States than by the courts of the United States. It is the State and not the Federal government . . . which stands, with reference to the persons and property of infants, in the situation of *parens patriae*.

Id. at 438. See also *In re Interest of M.B. & A.B.*, 239 Neb. 1028, 1030, 480 N.W.2d 160, 161 (1992) (citing "the power every sovereignty possesses as *parens patriae* to every child within its borders to determine the status and custody that will best meet the child's needs and wants" in the context of juvenile court jurisdiction); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 854-56 (2003) (discussing a state's responsibility to determine with whom children will have and maintain legal relationships).

3. 264 Neb. 217, 647 N.W.2d 56 (2002).

4. *Id.* at 219, 647 N.W.2d at 58.

5. The District Court of Douglas County issued its final order in 2001. *Id.* at 219, 647 N.W.2d at 58.

6. The Decree of Adoption was issued by the Court of Common Pleas of Philadelphia County, Family Court Division, Adoption Branch in 1997. Brief of Appellant at 12, *Russell* (No. A-01-965).

7. A coparent or second-parent adoption is one in which an unmarried partner of the legal parent is allowed to adopt the child without terminating the legal parent's rights. See Tiffany L. Palmer, Am. Bar Ass'n, *Family Matters: Establishing Legal Parental Rights for Same Sex Parents and Their Children*, 30 HUM. RTS. 9, 9 (Summer 2003), available at <http://www.abanet.org/irr/hr/summer03/paternal.html>.

Supreme Court of Nebraska reversed and remanded.⁸ While the majority opinion reversed the district court's decision based on a procedural finding,⁹ the concurring opinion focused on additional assignments of error made by the appellant and, in particular, discussed the doctrine of *in loco parentis*,¹⁰ which allows a person to "stand[] in the shoes' of the natural parent and assume[] the same rights and duties as such."¹¹ The concurring opinion in *Russell* provides some guidance to Nebraska courts as to the equitable doctrines that may be available under Nebraska law to substantiate rights, such as custody, visitation, and support, for individuals who have served as parents to children,¹² but who may not have secured, or been able to secure, a legal relationship with them through adoption.¹³

This Note will explore the law of second-parent adoption as it has developed among the states, the facts and opinions of *Russell*, and the doctrine of *in loco parentis* as applied by Nebraska and other state courts. In doing so, this Note will argue that, in light of the willingness of *Russell*'s concurring judges to apply the doctrine of *in loco parentis* to custody disputes between separated same-sex partners, courts in Nebraska should follow the concurring judges' lead and not hesitate to apply the doctrine as needed on a case-by-case basis in order to respond to the current needs of families and to provide for the best interests of children.¹⁴

8. *Russell*, 264 Neb. at 222, 647 N.W.2d at 60.

9. *Id.*

10. *Id.* at 229–31, 647 N.W.2d at 65–66 (Gerrard, J., concurring).

11. Felicia Meyers, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 854 (1993) (citing Elizabeth A. Delaney, Comment, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 194 (1991)).

12. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b at 128 (2000) [hereinafter PRINCIPLES] (citing equitable parent, equitable adoption, *in loco parentis*, and equitable estoppel as examples of "equitable doctrines [that] have been used by some courts to permit the extension of parental rights to an individual who otherwise would not qualify").

13. See *In re Adoption of Luke*, 263 Neb. 365, 371, 640 N.W.2d 374, 379 (2002) (per curiam). The Nebraska Supreme Court held that a coparent or second-parent adoption, such as the one *Russell* and Bridgens intended to achieve in Pennsylvania, is not possible under Nebraska's adoption statutes.

14. One pair of researchers argue that "[b]est interests of children are always at the heart of any analytical framework in an action where custody or visitation are at issue." Angela Dunne Tiritilli & Susan Ann Koenig, *Essay: Advocacy for Nebraska Children with Gay and Lesbian Parents: A Call for the Best Interests of the Child to Be Paramount in the Case of Non-Biological, Non-Adoptive Parents*, 36 CREIGHTON L. REV. 3, 17–18 (2002) (arguing that "the parental preference doctrine should be abolished in favor of the best interests of the child" in custody determinations involving "non-biological, non-adoptive parents"). See also NEB. REV. STAT. § 43-109(1) (Reissue 1998) ("If, upon the hearing, the court finds that such adoption is for the best interests of such minor child . . . , a decree of adop-

II. BACKGROUND

A. Second-Parent Adoption Among the States

Russell v. Bridgens provides an example of the how the Supreme Court of Nebraska has operated within a conceptual framework already established in the law in attempting to address the needs of same-sex couples and their children.¹⁵ The issues involved in *Russell* are those that many courts in recent years have faced in response to the increasing number of same-sex couples who wish to parent children.¹⁶ Those couples that decide to have families often face legal difficulties in providing health insurance and Social Security benefit coverage for their children, in securing inheritance rights, and in establishing the authority to consent for medical care.¹⁷ Furthermore, in the event that such couples separate, they are forced to confront widely diverging state laws in the areas of custody, visitation, and child support—the overlapping of which often produces results that are unjust for the parties and that fail to provide for the best interests of the children involved.¹⁸ In some jurisdictions, one option available to same-sex couples who wish to avoid such problems by establishing a legal parent-child relationship with their child is coparent adoption, or as it is more commonly termed, second-parent adoption. Like step-parent adoption,¹⁹ second-parent adoption allows an individual to adopt her or his partner's biological or adopted child without first terminating the partner's legal parental status.²⁰

tion shall be entered.”); *Luke*, 263 Neb. at 387, 640 N.W.2d at 389–90 (Gerrard, J., dissenting) (stating that a consideration of the best interests of children is “what this court has previously held to be the primary interpretive principle applicable to the adoption statutes”).

15. For an introduction to the diverse legal issues that GLBT individuals face in Nebraska and elsewhere, see Amy Miller, *Professionalism and Sexual Orientation*, NEB. LAW., Jan. 2004, at 7.
16. NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENT FAMILIES 1 (Jan. 2004) (citation omitted), available at <http://www.nclrights.org/publications/pubs/adptn0204.pdf>. See also Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. LAW. 95, 108 (2002) (discussing a “trend” in the last twenty years in which same-sex partners are increasingly able to effect joint and second-parent adoptions).
17. See Palmer, *supra* note 7, at 9.
18. *Id.*
19. Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 200 (2003).
20. NAT'L CTR. FOR LESBIAN RIGHTS, SECOND PARENT ADOPTIONS: A SNAPSHOT OF CURRENT LAW 1 (Aug. 2003), available at <http://www.nclrights.org/publications/pubs/2pa0803.pdf>.

Only a few months before its decision in *Russell*,²¹ the Nebraska Supreme Court decided *In re Adoption of Luke*²² and found that an unmarried partner of an individual already possessing parental rights over a child could not adopt that child without the parent that possesses parental rights first relinquishing those rights.²³ Specifically, the Court stated that "with the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child before 'any minor child may be adopted by any adult person or persons.'"²⁴ Other states have wrestled with the same question: do the state's adoption statutes allow second-parent adoption by persons other than stepparents? The import of a given state's answer is substantial, since the resolution of this issue inevitably establishes the foundation for defining the legal relationships between same-sex couples and their children in that state.

In response to the above question, most state courts that have addressed the issue interpret their own adoption statutes liberally to allow same-sex couples to adopt their partner's biological or adoptive children.²⁵ These courts often rely on their broad discretion in providing for the best interests of the child.²⁶ However, a few state courts,

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21. The decision in *In re Adoption of Luke* was filed on March 8, 2002; the decision in *Russell v. Bridgens* was filed on June 28 of the same year.
 22. *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002) (per curiam).
 23. *Id.* at 377, 640 N.W.2d at 383.
 24. *Id.* at 371, 640 N.W.2d at 379 (quoting NEB. REV. STAT. § 43-101(1) (Reissue 1998 & Cum. Supp. 2002)). The Court in *Luke* interpreted the Nebraska adoption statutes, found at NEB. REV. STAT. §§ 43-101 to -115 (Reissue 1998 & Cum. Supp. 2002), to require that, with the exception of stepparent adoption, any parent possessing parental rights must first relinquish his or her child before that child is eligible for adoption. *Luke*, 263 Neb. at 371, 640 N.W.2d at 379.
 25. See, e.g., *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003) (stating that the California statutes authorize an "independent adoption" in which the legal parent's rights are not terminated and that such statutes are constitutional), *cert. denied*, 540 U.S. 1220 (2004); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1201-02 (Pa. 2002) (holding that parents should be allowed to show good cause as to why their same-sex partners should be allowed to adopt their children without terminating their own parental rights); see also Morley et al., *supra* note 19, at 201-02 & nn.243-49 (observing that courts in Ohio, Pennsylvania, Delaware, Connecticut, Vermont, Illinois, and New Jersey, among others, have interpreted their state statutes to provide either custodial or adoptive rights to same-sex partners).
 26. See, e.g., *In re Hart*, 806 A.2d 1179, 1182 (Del. Fam. Ct. 2001) (holding that a same-sex partner of the children's legal parent may adopt them without affecting that parent's legal rights when the adoption is in the children's best interests); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003) (authorizing second-parent adoption through the application of the best interest of the child standard); see also AM. BAR ASS'N, REPORT (Summer 2003) (stating that the best interests of the child is the purpose behind the Association's adoption of a resolution that supports joint and second-parent adoptions), available at <http://www.abanet.org/leadership/2003/journal/112.pdf>.

like Nebraska's, have construed their state's adoption statutes narrowly and found that they preclude the possibility of second-parent adoption by any person other than stepparents.²⁷ Moreover, because same-sex couples have so far been precluded from marrying in Nebraska,²⁸ they are also unable to invoke the stepparent exception. Currently, only a few states have chosen to enact legislation to either explicitly allow or preclude second-parent adoptions by same-sex couples.²⁹

Although the Nebraska Supreme Court denied the possibility of effecting second-parent adoptions in *Luke*, many questions remain. One such question is whether a Nebraska court would give full faith and credit to second-parent adoptions completed in sister states.³⁰ *Russell* indicates that the answer is yes, but leaves open the possibility that a litigant might collaterally attack a foreign adoption decree for lack of jurisdiction.³¹ Another important question remaining after both *Luke*

27. See *Luke*, 263 Neb. at 376, 640 N.W.2d at 382-83; see also *In re T.K.J.*, 931 P.2d 488, 492 (Colo. Ct. App. 1996); *In re Angel Lace M.*, 516 N.W.2d 678, 683 n.8 (Wis. 1994). See also Morley et al., *supra* note 19, at 200 & n.238 (noting that some states reject second-parent adoptions, because often "the law facilitates adoption by married stepparents, but not gay partners.").

28. See Defense of Marriage Amendment ("DOMA"), NEB. CONST. art. I, § 29 (adopted 2000). The recent amendment to the Nebraska Constitution states: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." *Id.*

29. See CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West Supp. 2002) ("[A]ny parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child."); VT. STAT. ANN. tit. 15A, §1-102(b) (Supp. 2002) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."). But see FLA. STAT. § 63.042(3) (2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); MISS. CODE ANN. § 93-17-3(2) (2000) ("Adoption by couples of the same gender is prohibited.").

30. As of the time of publication of this Note, very few courts have addressed this question. See, e.g., Press Release, Nat'l Ctr. for Lesbian Rights, Lesbian Attempts to Use Anti-Gay Law to Invalidate Second-Parent Adoption (Apr. 24, 2000) (calling a biological mother's attempt to invalidate her former partner's second-parent adoption "unprecedented"), available at <http://www.nclrights.org/releases/nocar.htm>. See also Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 779-85 (2003) (discussing only three examples in which courts and a state legislature have concluded that states must extend full faith and credit to second-parent adoptions granted in other states).

31. *Russell v. Bridgens*, 264 Neb. 217, 220, 647 N.W.2d 56, 59 (2002). While the majority opinion stated as a general matter that "a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction

and *Russell* is what equitable remedies exist in Nebraska that might secure rights such as custody and visitation for individuals who have in fact parented a child but who are unable to establish a legal relationship through adoption? The concurring opinion in *Russell*, through its discussion of the doctrine of *in loco parentis*, provides some guidance in addressing this issue.

B. Facts and Opinions in *Russell v. Bridgens*

At the time the Pennsylvania coparent adoption took place, Russell and Bridgens were a same-sex couple who lived together and wanted to adopt a child.³² In 1996, Bridgens adopted Joseph Noble Bridgens in a court in Pennsylvania, the state where Joseph was born. Then in 1997, both Bridgens and Russell adopted Joseph through a "co-parent adoption" in the Court of Common Pleas of Philadelphia County.³³ The family lived together in Germany until the couple separated in 1999, when Russell and Joseph moved back to the United States. In 2000, Russell filed a petition to establish custody and support for Joseph in the District Court of Douglas County, Nebraska.³⁴ In response, Bridgens filed a motion for summary judgment, alleging that the Pennsylvania coparent adoption was invalid.³⁵ Accepting Bridgens' argument that the Pennsylvania adoption could be collaterally attacked in Nebraska for lack of subject matter jurisdiction under Pennsylvania law, the district court granted Bridgens' motion and dismissed Russell's complaint.³⁶ In reaching its decision, the district court did not employ an analysis of the child's best interests; nor did it address the pressing issues of custody or visitation of Joseph by Russell,³⁷ who had been his primary caregiver for five years.³⁸ Further, the district court failed to consider any other basis besides the Pennsylvania adoption under which Russell might have such custody or visitation rights.³⁹

On appeal, Russell assigned five errors, the first of which was addressed by the majority opinion: the district court erred in failing to apply the Full Faith and Credit Clause of the United States Constitu-

over the parties or the subject matter," *id.*, the concurring opinion argued that Pennsylvania law would not permit such a collateral attack on the facts of *Russell*. *Id.* at 223-26, 647 N.W.2d at 61-63.

32. Brief of Appellant at 9, *Russell* (No. A-01-965).

33. Brief of Appellee at 2, *Russell* (No. A-01-965).

34. *Russell*, 264 Neb. at 219, 647 N.W.2d at 58.

35. *Id.*

36. *Id.* at 219, 647 N.W.2d at 58-59.

37. *Id.* at 222-23, 647 N.W.2d at 61 (Gerrard, J., concurring).

38. Brief of Appellant at 9, *Russell* (No. A-01-965).

39. *Russell*, 264 Neb. at 229, 647 N.W.2d at 65 (Gerrard, J., concurring) (arguing that "the district court's . . . assumption that the adoption issue was dispositive of the action" was erroneous).

tion.⁴⁰ Basing its reversal on a narrow procedural finding, the majority held that the record failed to demonstrate, as a matter of law, that the 1997 Pennsylvania coparent adoption decree was not entitled to full faith and credit under the United States Constitution, primarily because the record only included the adoption decree and not the petition for adoption.⁴¹ Consequently, Bridgens failed to meet the burden required for summary judgment, an error requiring reversal and remand.⁴²

Because reversal was required under this relatively narrow procedural holding, the majority of the Court did not consider Russell's remaining assignments of error, which involved the following questions: whether *res judicata* bars an attack on an adoption decree by a sister state; whether Russell's affidavit detailing her role as the primary caregiver should have been admitted into evidence; whether equitable estoppel bars the motion for summary judgment; whether Russell had attained status to petition for custody under the doctrine of *in loco parentis*; and whether the child's best interests should have been considered.⁴³ However, the concurring opinion by Justice Gerrard, in which Justice Wright joined, did address some of these additional assignments of error.

Regarding the issue of whether Nebraska must give full faith and credit to a Pennsylvania coparent adoption, the concurring opinion stated that the validity of a coparent adoption under Pennsylvania law is not an issue of subject matter jurisdiction that can be subject to later collateral attack.⁴⁴ As to the question of *res judicata*, the concurring opinion stated that even if Bridgens could have timely appealed the Pennsylvania court's finding that it had subject matter jurisdiction, she could not later collaterally attack such a finding in a different state, since "jurisdictional determinations made in a prior proceeding are *res judicata* in a subsequent proceeding involving the same litigants."⁴⁵

In discussing the doctrine of *in loco parentis*, the concurring judges emphasized the magnitude of its impact on Russell's ability to petition for custody and support: "Even if the Pennsylvania adoption decree is not entitled to full faith and credit, Russell is entitled to proceed to trial standing *in loco parentis*."⁴⁶ In other words, since the consideration of *in loco parentis* is an equitable one, entirely distinct from any

40. *Id.* at 219–20, 647 N.W.2d at 59.

41. *Id.* at 221–22, 647 N.W.2d at 60.

42. *Id.* at 222, 647 N.W.2d at 60.

43. *Id.* at 219, 647 N.W.2d at 59.

44. *Id.* at 226, 647 N.W.2d at 63.

45. *Id.* at 226–27, 647 N.W.2d at 63 (stating that "an unappealed final determination of [a court's] subject matter jurisdiction—albeit erroneous—is *res judicata* as to those litigants").

46. *Id.* at 231, 647 N.W.2d at 66.

attempted adoption or other actions at law in sister states, a finding that Russell is a parent under the doctrine of *in loco parentis* would have been sufficient to defeat Bridgens' motion for summary judgment on its own. The concurring opinion reveals the power of this equitable argument for litigants in Russell's position: "[A party] can maintain her petition [to establish custody and support] regardless of whether the [foreign state's] adoption decree is given full faith and credit, if [such party] can demonstrate an *in loco parentis* relationship with the minor child."⁴⁷

Finally, the concurring opinion stressed its concern that "the record reflects that the minor child's best interests have needlessly remained unaddressed while these proceedings continue on."⁴⁸ The opinion advised the district court to make "interim arrangements . . . for the minor child's visitation with whichever party does not have temporary custody" and to order such visitation "consistent with the best interests of the child."⁴⁹

III. ANALYSIS

A. Other States' Application of Equitable Doctrines to Issues Involving Same-Sex Families

The concurring opinion in *Russell* makes it clear that when the legal adoptive relationship between a parent and child is in question, the availability of equitable doctrines, such as *in loco parentis*,⁵⁰ for individuals in Russell's position is vital to providing an enforceable basis for such relationships to continue.⁵¹ Moreover, equitable remedies may be the *only* ones available to same-sex couples living in states with laws similar to those of Nebraska, under which same-sex partners can neither marry nor effect second-parent adoptions.

For example, two lesbian partners who decide that one of them will give birth to a child through artificial insemination, plan to raise the child together, do so for several years, and later end their relationship, will find themselves in very different legal positions with respect to

47. *Id.* at 230, 647 N.W.2d at 66.

48. *Id.* at 222, 647 N.W.2d at 61.

49. *Id.* at 227, 647 N.W.2d at 66.

50. Other equitable doctrines include *de facto* (or psychological) parenthood, which "connotes a parent-child relationship that does not conform to statutory definitions of parenthood, but exists in fact." Meyers, *supra* note 11, at 854. See also PRINCIPLES, *supra* note 12, §2.03(1)(c), at 118 (defining "*de facto* parent"); Morley et al., *supra* note 19, at 203-05 (discussing various state courts' findings of "*de facto* parenthood").

51. *Russell*, 264 Neb. at 229, 647 N.W.2d at 65 ("Discussion of this issue is essential because under the *in loco parentis* doctrine, as established by both Nebraska and Pennsylvania law, Russell can maintain her petition for custody even if the Pennsylvania adoption decree is not entitled to full faith and credit.").

their child.⁵² One partner, as the child's biological parent, will be presumed to have parental rights over the child. The other, having been precluded from establishing a legal adoptive relationship with the child under state adoption law, will be left without legal recourse to maintain her relationship with the child.⁵³ In situations such as these, it is imperative for courts to consider equitable doctrines such as *in loco parentis* in order to reach a result that recognizes an existing parent-child relationship and that is also in the child's best interests.

In general, based on their equitable power to consider the best interests of the child, state courts have readily awarded visitation to persons other than legal parents who have played a significant role in a child's life, including grandparents, other relatives, and nonrelatives.⁵⁴ Furthermore, courts in many states are moving away from their initial reluctance to grant parent-like rights to more than one father or mother, toward a willingness to allow same-sex partners to petition for custody, visitation, or both.⁵⁵

52. See Diana Laurretta, Comment, *Protecting the Child's Best Interest: Defending Second-Parent Adoptions Granted Prior to the 2002 Enactment of California Assembly Bill 25*, 33 GOLDEN GATE U. L. REV. 173, 173 (Spring 2003).

53. See Logue, *supra* note 16, at 115 (describing a similar situation as a "[t]ypical case" in which "the parent-child relationships of nonbiological de facto parents [are] cast into legal limbo").

54. See, e.g., *Rideout v. Riendeau*, 761 A.2d 291, 301 (Me. 2000) (upholding constitutionality of Maine's grandparent visitation statute, particularly for a grandparent who has "functioned as a parent to the child"); *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999) (affirming an aunt's visitation privileges when the aunt raised her niece for most of her life); *Rosse v. Rosse*, 244 Neb. 967, 973, 510 N.W.2d 73, 78 (1994) (affirming a grandparent visitation award in a dissolution proceeding where "clear and convincing evidence [existed] that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship"); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (ruling that the court had power to award visitation to a person who acted as an equal coparent with the biological parent pursuant to a best-interest determination). But see *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (finding that a broad Washington statute which permitted a visitation award to "[a]ny person" as applied to the facts of the case violates the due process rights of those biological parents).

55. See PRINCIPLES, *supra* note 12, § 2.18, at 397-98; Morley et al., *supra* note 19, at 205. Notably, state custody and visitation statutes also reflect the significance of equitable considerations for such matters involving families. See, e.g., HAW. REV. STAT. § 571-46(2) (2000) (awarding custody to "[a]ny person who has had de facto custody of the child in a stable and wholesome home" when such an award is in the best interest of the child); MICH. COMP. LAWS ANN. § 722.27(sec.7)(1)(c) (2001) (favoring individuals who demonstrate their role as "de facto parents" in custody disputes); MISS. CODE ANN. § 93-5-24(1)(e) (2001) (favoring persons in custody disputes when the child has lived with them for a substantial period of time in a "wholesome and stable environment").

Certainly, some state courts that have confronted situations similar to the one described above have failed to consider equitable doctrines such as *in loco parentis* in determining the rights of the parties. For example, a court in Michigan refused to grant custody to a nonlegal parent after the death of her same-sex partner, the biological parent.⁵⁶ In addition, courts in Florida and Tennessee have held that an individual is not entitled to seek custody of or visitation with the child of his or her former partner after the couple separates.⁵⁷ Such failure eliminates the possibility of any continuation of parent-like relationships between children and their nonlegal parents, unless the parties reconcile.⁵⁸

On the other hand, courts in many states have given weight to the underlying premises of equitable doctrines, such as *in loco parentis*, in situations in which couples, like the same-sex couple discussed above, dispute the issues of custody and visitation after their relationship ends.⁵⁹ For example, a Pennsylvania court found that a former same-sex partner of the biological parent had standing to petition for partial custody because the partner stood *in loco parentis* to the child.⁶⁰ In addition, a Wisconsin court held that the equitable powers of a court, which exist apart from the grant of power under the state visitation statute, may be exercised in awarding visitation to a nonlegal parent who has "a parent-like relationship with the child" when it is in the child's best interests.⁶¹ Employing similar reasoning, the New Jersey Supreme Court awarded visitation to a former same-sex partner based on the *in loco parentis* relationship that the partner had with the

56. McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995).

57. Kazmierczak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 2000).

58. See Dwyer, *supra* note 2, at 855 (stating that "when the state declines to create a legal relationship or to give legal protection to a social relationship, a social relationship . . . might cease").

59. See PRINCIPLES, *supra* note 12, § 2.18, at 389-98.

60. J.A.L. v. E.P.H., 682 A.2d 1314, 1319 (Pa. Super. Ct. 1996). In its discussion of nonparent standing, the court stated:

The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. . . . [W]here the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. . . . our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.

Id.

61. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

child.⁶² Furthermore, a Minnesota court upheld a trial court's grant of joint legal custody between a biological parent and her former same-sex partner when joint custody was in the child's best interests.⁶³ Other state courts have employed similar analyses in considering whether to grant parent-like rights to former same-sex partners under equitable doctrines such as *in loco parentis* and *de facto* parenthood.⁶⁴

B. The *In Loco Parentis* Doctrine in Nebraska

Under the guidance of *Russell's* concurring judges, Nebraska courts should recognize and follow the movement among other states to use equitable doctrines to provide legal, parent-like rights to individuals who have served as parents to children. In so doing, courts will be able to respond to the genuine need among families with same-sex parents to protect their legal relationships while operating under a doctrine that is already supported by strong precedent in Nebraska caselaw—the doctrine of *in loco parentis*. Furthermore, by applying the *in loco parentis* doctrine more freely, courts in Nebraska will be certain to conduct a thorough examination of all relevant evidence on a case-by-case basis in order to equitably determine the rights of parties and to provide for the best interests of the children involved in such cases.

The Nebraska Supreme Court has adopted the following standard in applying this doctrine:

"[A] person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent."⁶⁵

Presumably to ensure that the doctrine will be applied only in worthy cases, the court has limited its application in several ways. First, the

62. *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (stating that "continued regular visitation is in the twins' best interests because V.C. is their psychological parent"). See also *S.F. v. M.D.*, 751 A.2d 9, 17 (Md. Ct. Spec. App. 2000) (finding that a former same-sex partner had standing to petition for visitation based on the existence of a parent-like relationship, but affirming trial court's denial of visitation based on a determination of the best interests of the child).

63. *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000).

64. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (holding that Massachusetts courts may grant visitation to *de facto* parents who have, among other things, participated in the child's life as a member of the child's family); *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001) (discussing what constitutes *in loco parentis* status).

65. *Russell v. Bridgens*, 264 Neb. 217, 229, 647 N.W.2d 56, 65 (2002) (Gerrard, J., concurring) (emphasis in original) (quoting *Weinand v. Weinand*, 260 Neb. 146, 152–53, 616 N.W.2d 1, 6 (2000)). See also *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 592, 477 N.W.2d 8, 17 (1991) (citing *Austin v. Austin*, 147 Neb. 109, 112–13, 22 N.W.2d 560, 563 (1946)).

court has emphasized that in order for the doctrine to apply, the individual must be one "who has fully put himself or herself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship and who actually discharges those obligations."⁶⁶ In addition, the court has stated:

The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred. The parental relationship should be found to exist only if the facts and circumstances show that the stepparent *means* to take the place of the lawful father or mother not only in providing support but also with reference to the natural parent's office of educating and instructing and caring for the general welfare of the child.⁶⁷

In keeping with these limitations, the court has refused to extend the doctrine to an ex-stepparent who "ha[d] neither the legal means nor the intention of taking the place of the lawful father," when a finding of *in loco parentis* would have imposed an obligation of child support upon the ex-stepparent.⁶⁸ On the other hand, the court has applied the doctrine of *in loco parentis* to an ex-stepparent for the purpose of upholding a visitation award when the stepparent lived with the child for almost eight years.⁶⁹ The court noted that "[t]hey referred to each other as father and daughter; there was a close and loving relationship between them; he was involved in her day-to-day care, including any necessary discipline; and he took an active interest in her education and other school activities."⁷⁰

C. Toward a Broad and Equitable Application of *In Loco Parentis* in Nebraska Courts

Against the foregoing precedential backdrop, the concurring opinion in *Russell* illustrates how a court in Nebraska may apply an *in loco parentis* analysis to the situations of same-sex couples who separate and subsequently petition to establish custody and support. Beyond the somewhat narrow facts of *Russell*, however, the scope of potential use of *in loco parentis* for same-sex couples and their children remains an unexplored frontier in the exercise of judicial discretion. In addition to providing remedies, such as custody and visitation, to families like those in *Russell* who are at the point of separation in their relationship, the question remains whether the doctrine may be developed

66. *Russell*, 264 Neb. at 230, 647 N.W.2d at 65 (citation omitted); *Weinand*, 260 Neb. at 153, 616 N.W.2d at 7 (citing *McManus v. Hinney*, 151 N.W.2d 44 (Wis. 1967)).

67. *Russell*, 264 Neb. at 230, 647 N.W.2d at 65 (citing *Weinand*, 260 Neb. at 154, 616 N.W.2d at 7).

68. *Weinand*, 260 Neb. at 153, 616 N.W.2d at 7.

69. *Hickenbottom*, 239 Neb. at 592, 477 N.W.2d at 17.

70. *Id.* But see *In re Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002) (finding that a grandmother who served as a foster parent to her grandchild could not intervene in a juvenile dependency proceeding because she had not attained the status of *in loco parentis* at the time of intervention).

more broadly in order to provide parent-like rights, albeit short of legal adoption, to litigants such as those in *In re Adoption of Luke*.⁷¹

While *Luke* precludes the possibility of second-parent adoption in Nebraska absent a relinquishment of rights by the legal parent,⁷² the doctrine of *in loco parentis*, in conjunction with due analysis of the best interests of the child, can provide a child with many of the advantages of having a second legal parent while the family is still a cohesive unit.⁷³ At least one court of another state has addressed the possibility of granting joint custody to a legal and nonlegal parent. The parties in *In re Bonfield*⁷⁴ sought to allocate custody between the adoptive parent and her same-sex partner out of their concern that the partner's lack of parental rights would not serve their children's best interests in the event of the legal parent's death or the couple's separation.⁷⁵ The appellate court, while refusing to allow the same-sex partner to petition for "shared parenthood," upheld the Ohio juvenile courts' jurisdiction to determine whether shared custody is in the best interests of the child.⁷⁶

In applying the doctrine of *in loco parentis* to two same-sex parents who are both seeking to have a legal parental relationship with their child(ren), Nebraska courts should employ an in-depth, fact-dependent⁷⁷ analysis similar to that which is applied in custody determinations after couples separate. The party invoking the doctrine of *in loco parentis* should be allowed to present any evidence that tends to show that he or she "has fully put himself or herself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship" and that he or she has "actually discharge[d] those obligations."⁷⁸

One piece of evidence the court may consider in deciding whether a party "assume[d] *all* the obligations incident to the parental relation-

71. 263 Neb. 365, 371, 640 N.W.2d 374, 379 (2002) (per curiam). In general terms, the litigants in *Luke* were a same-sex couple attempting to complete a second-parent, or coparent, adoption. They came before the court as an intact family, as compared to couples who are at the point of separation and seeking to establish custody or visitation.

72. *Id.* at 371, 640 N.W.2d at 379.

73. See Tiritilli & Koenig, *supra* note 14, at 12–15 (arguing that legal representatives of gays and lesbians in Nebraska should advocate for parent-like rights including custody and visitation under the doctrine of *in loco parentis*).

74. 780 N.E.2d 241 (Ohio 2002).

75. *Id.*

76. *Id.* at 244, 249.

77. See *Russell v. Bridgens*, 264 Neb. 217, 230, 647 N.W.2d 56, 65 (2002) (Gerrard, J., concurring) ("The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred.") (citing *Weinand v. Weinand*, 260 Neb. 146, 154, 616 N.W.2d 1, 7 (2000)).

78. *Russell*, 264 Neb. at 230, 647 N.W.2d at 65.

ship”⁷⁹ is the completion, or attempted completion, of a second-parent adoption of the child. Notably, the concurring judges in *Russell* recognized that the completion of an adoption of the child by the person invoking the doctrine of *in loco parentis* would be “persuasive evidence supporting the existence” of such a relationship.⁸⁰ However, since the completion of such a second-parent adoption is not a viable option for same-sex couples in Nebraska at this time,⁸¹ courts should review other evidence relevant to the partner’s discharging of the obligations of a parent.⁸²

Other evidence that Nebraska courts may consider in deciding whether a party stands *in loco parentis* to the child includes any statements relating to the party’s involvement in the child’s life. In *Russell*, for example, the concurring judges stated that the affidavit that “describes, in detail, Russell’s activities in the role of ‘primary care provider for [the minor child] since [the minor child] was adopted at age 9 months’” should not have been excluded by the district court, since it was relevant to the disposition of the case under the doctrine of *in loco parentis*.⁸³ Certainly, evidence that the partners arranged together for either the artificial insemination of the biological parent or the adoption of a child (as was the case for Russell and Bridgens), planned to raise the child together, and lived together with the child as a family are all relevant evidence as to whether the nonlegal parent has established an *in loco parentis* relationship with the child.⁸⁴ In addition, the courts should consider any evidence that the couple executed a coparenting agreement, stating that their parental rights and duties will continue in the event the couple separates, or any other

79. *Id.* at 230, 647 N.W.2d at 65.

80. *Id.* at 230, 647 N.W.2d at 66.

81. *See In re Adoption of Luke*, 263 Neb. 365, 376, 640 N.W.2d 374, 382–83 (2002) (per curiam) (holding that “the parents’ parental rights must be terminated or the child must be relinquished in order for the child to be eligible for adoption” under Nebraska’s statutory scheme).

82. *See also J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 n.4 (Pa. Super. Ct. 1996) (stating that the parties’ failure to pursue a second-parent adoption did not “detract[] in any way from the evidence of the parties’ efforts to formalize the relationship between [the partner] and the child” when the validity of such adoptions was uncertain in Pennsylvania at the time).

83. *Russell*, 264 Neb. at 230, 647 N.W.2d at 66 (alteration in original).

84. *See J.A.L.*, 682 A.2d at 1322 (stating that the relevant issue in determining whether there was an *in loco parentis* relationship was whether “parties by their conduct created a parent-like relationship between [the partner] and the child,” not the parties’ subjective thought processes, doubts, or intentions); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995) (giving weight to evidence that the legal parent consented to and fostered a parent-like relationship between the partner and the child, that the nonlegal parent assumed obligations of parenthood, and that the length of time the partner spent with the child was sufficient to establish “a bonded, dependent relationship parental in nature”).

legal documents establishing guardianship or medical consent for the nonbiological parent.⁸⁵

In Nebraska, the state legislature has provided additional guidance for courts in making custody determinations in general. Thus, Nebraska courts' determination of whether to allocate custody between same-sex parents should include evidence that shows the parties have fulfilled many of the "parenting functions" outlined in Nebraska's Parenting Act.⁸⁶ The Act provides:

Parenting functions shall mean those aspects of the parent-child relationship in which the parent makes fundamental decisions and performs fundamental functions necessary for the care and development of the minor child. Parenting functions shall include, but not be limited to:

- (a) Maintaining a loving, stable, consistent, and nurturing relationship with the minor child;
- (b) Attending to the ongoing needs of the minor child, including feeding, clothing, physical care and grooming, supervision, and engaging in other activities appropriate to the healthy development of the minor child within the social and economic circumstances of the family;
- (c) Attending to adequate education for the minor child, including remedial or other special education essential to the best interests of the minor child;
- (d) Assisting the minor child in maintaining a positive relationship with both parents and other family members;
- (e) Assisting the minor child in developing and maintaining appropriate interpersonal relationships; and
- (f) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the minor child within the social and economic circumstances of the family.⁸⁷

Extending the doctrine of *in loco parentis* to families with same-sex parents who seek a legal declaration of shared custody *before* the couple reaches the point of separation will not only allow Nebraska courts to reach more equitable determinations based on in-depth factual inquiries, but it will also aid courts in evaluating whether a grant of custody or visitation will provide for the child's best interests, a concern which one Supreme Court Justice has referred to as "primary" in the context of adoption.⁸⁸ According to one researcher, courts in Nebraska apply an analysis of what is in the best interests of children to

85. See *J.A.L.*, 682 A.2d at 1321-22. The Pennsylvania court noted that the nonlegal parent's refusal to execute a coparenting agreement would not defeat standing to petition for custody, since it was uncertain whether such an agreement would be enforceable under Pennsylvania law. *Id.* at 1321 n.4.

86. NEB. REV. STAT. §§ 43-2901 to -2919 (Reissue 1998).

87. *Id.* § 43-2903.

88. See *In re Adoption of Luke*, 263 Neb. 365, 387, 640 N.W.2d 374, 389-90 (2002) (Gerrard, J., dissenting) (stating that a consideration of the best interests of children is "what this court has previously held to be the primary interpretive principle applicable to the adoption statutes"); see also Tiritilli & Koenig, *supra* note 14, at 17-18 (2002) (arguing that the best interests of the child" should be of paramount concern in custody determinations involving "non-biological, non-adoptive parents").

"a number of varying . . . actions involving children from whether a child should be moved across state lines to whether a minor child's name should be changed."⁸⁹ In applying a best-interests analysis, courts must recognize that the benefits enjoyed by children with two legal parents do not, and should not, exist only when partners separate. The security of financial support, inheritance rights, coverage under the parents' health insurance, medical consent by both parents, and visitation rights in the event of separation are among the many privileges from which children and parents benefit when their relationship is legally recognized.⁹⁰ Nebraska courts are able to afford such equitable outcomes to families with same-sex parents based on their ability to apply the *in loco parentis* doctrine to a broad range of circumstances.

IV. CONCLUSION

As the concurring opinion in *Russell* illustrates, courts in Nebraska should apply the equitable doctrine of *in loco parentis* to cases involving families with same-sex parents in order to properly provide for the child's best interests on a case-by-case basis. The need for a broader application of such equitable doctrines is even greater for those families who, in states such as Nebraska, are currently precluded from establishing the legal protection afforded by marriage and second-parent adoptions. So precluded, families with same-sex parents feel the adverse effects of parental separation much more deeply than do other families who benefit from the legal ability to marry and adopt children. In the worst-case scenario, a nonlegal parent will be permanently forbidden from visiting the child he or she has helped raise, and the child will suffer a profound and permanent loss as a result. Despite the lack of legal alternatives for families with same-sex parents, Nebraska courts retain the power to address their needs by awarding custody and visitation under equitable doctrines such as *in loco parentis*. In so doing, courts will enforce the spirit of Nebraska family law by recognizing parent-child relationships as they currently exist and by affording the opportunity for such relationships to continue in the future.

Katie A. Fougeron

89. Tiritilli & Koenig, *supra* note 14, at 17 & n.70 (citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002)). See also NEB. REV. STAT. § 43-109(1) (Reissue 1998) ("If, upon the hearing, the court finds that such adoption is for the best interests of such minor child . . . , a decree of adoption shall be entered.").

90. See Palmer, *supra* note 7, at 9.